No. 1425

IN THE

UNITED STATES

CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

BRIEF OF APPELLANT IN ERROR

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PUGET SOUND NAVIGATION COMPANY, a Corporation, Plaintiff in Error vs. MARY R. LAVENDER, CHARLES STANLEY and SAMUEL BARLO, Defendants in Error	No. 1425

BRIEF OF APPELLANT IN ERROR

Upon Writ of Error to the United States Circuit Court for the Western District of Washington, Northern Division

STATEMENT.

This action was brought by the defendant in error, Mary R. Lavender, against the plaintiff in error and the defendants in error, Charles Stanley and Samuel Barlo, to recover for the alleged wrongful acts of the plaintiff in

error, in providing a defective port on board the steamer Lydia Thompson, and in having said Lydia Thompson insufficiently manned, and for the alleged negligence of the defendants in error, Stanley and Barlo, as the Master and Mate respectively of said Lydia Thompson, and as the servants of the plaintiff in error, in not promptly rescuing one R. O. Lavender, the alleged deceased husband of the said Mary R. Lavender, after said Lavender had fallen off from the Lydia Thompson, which he was alleged to have done as a consequence of such defective port, and from all of such acts and omissions the said R. O. Lavender is alleged to have drowned on the third day of November, 1904.

The allegations of the amended complaint are, that the plaintiff in error "*is*"—at the time of filing said complaint on the 27th day of June, 1906—"the owner and operator of a certain steamer called the Lydia Thompson." There is no allegation that the plaintiff in error *was* the owner or operator of said steamer, or had anything to do with said steamer at the time when the accident took place. It is only fair, however, to the Court and Counsel, in view of the foregoing statement, to admit that the record, if complete, would show that a previous complaint, identical with the amended complaint, used the same language some ten months previous. That brings the allegations of ownership and operation by the plaintiff in error of the steamboat Lydia Thompson to a time some eight months subsequent to the alleged wrongful acts. No proof was offered with regard to such allegation, or that the plaintiff in error ever owned or operated the vessel in question.

The complaint went on to recite that a certain port or opening in the side of the Lydia Thompson was defectively fastened and that the deceased, R. O. Lavender, came to his death by falling out of or out with this port.

And further, that the defendants in the court below were negligent in not promptly rescuing the said R. O. Lavender as he fell into the water. It was further alleged that the Lydia Thompson was insufficiently manned. There was no attempt made to prove that any one saw the said R. O. Lavender fall into the water, or that any one ever saw him after he left the pilot house in obedience to the direction of the mate of the steamer to go down and open, *not the port, which is alleged to have been defectively fastened*, which constituted the lower half of the port opening of the vessel, but the upper half thereof, which consisted of two doors meeting together vertically and closing upon the alleged defective port horizontally. There was no attempt made to prove what the condition of the ports in question was until after the alleged accident, after the port in question, which went overboard, had been recovered and the vessel had proceeded on her voyage from the next port of call; all of which acts and things would involve handling and changing the fastenings.

The case was tried before the court and jury on the 28th day of June, 1906.

At the close of the plaintiff's case the Puget Sound Navigation Company, defendant in the court below and plaintiff in error here, moved the court to enter a nonsuit and to direct the jury to bring in a verdict for said defendant. The motion was denied by the lower court and, at the close of the evidence in the case being renewed, was again denied.

A verdict was rendered in favor of the defendant in error, Mary R. Lavender, and against the plaintiff in error in the sum of $5,500, and in favor of the defendants in error, Stanley and Barlo. In addition thereto the jury answered interrogatories propounded to them as follows, to-wit:

INTERROGATORIES PROPOUNDED TO JURY.

"1. If the jury return a verdict in favor of the plaintiff in this cause, the jury is requested to state whether or not the defendant had any reason to apprehend the death of said R. O. Lavender through any act on the part of the defendant?

ANSWER: No.

2. If the jury return a verdict in favor of the plaintiff, the defendant requests that the jury state the specific acts of negligence on the part of the defendant which was the proximate cause of the death of the said R. O. Lavender.

ANSWER: Defective port and ship not properly manned."

(Trans. pp. 16 and 17.)

The verdict and the special findings of the jury emphatically dispose of the contention that there was any negligence in the manner or time of attempting to rescue the said R. O. Lavender, for they find in favor of the defendants Stanley and Barlo, the master and mate of the vessel (see Trans., p. 15), through whose negligence, if any, the negligence of the plaintiff in error must be established, and the jury expressly find that the said R. O. Lavender came to his death as a result of a defective port and an insufficiently manned vessel.

The plaintiff in error filed a motion and petition for new trial, which were denied by the court and and a judgment entered up in favor of the defendant in error, Mary R. Lavender, against the plaintiff in error, from which this writ of error issued out.

SPECIFICATIONS OF ERROR.

The plaintiff in error desires to specify the following errors occurring at the trial and to which exceptions were taken and upon which the plaintiff in error will rely.

1. That Mary R. Lavender was allowed to answer the question propounded to her with reference to the earning of R. O. Lavender, deceased, as follows:

"Q. At what price?

A. Well, they would give him $50 a month and then a percentage—I don't know—it would amount to $1,500 a year or more. The year before it would, and it would amount to more this next year.

MR. BRONSON. I move to strike out the latter part as to what it might amount to over and above $50, as a speculation.

The COURT. The motion to strike is denied.

(Exception noted for defendant.)
(Trans., p. 45.)

2. Error of the Court in allowing said witness Mary R. Lavender to answer the question which was objected to and ruled upon and answered as follows:

Q. When was his death, do you know, what time of the year or month?

MR. BRONSON: I object to that for the reason that she has not testified that she knows as to his death.

(Objection overruled. Exception noted for defendant.)

A. It was November 3rd, 1904.

(Trans., p. 46.)

3. Error in allowing the witness A. H. Hahl to answer the question which was objected to, ruled upon and answered as follows:

Q. (MR. BYERS.) State what, if anything, you heard said, with regard to getting a boat out.

MR. BRONSON. We object to what the bystanders or passengers said as irrelevant, immaterial and incompetent.

The COURT. Everything that was said and done at that time is part of the *res gestae* and it is material. I will overrule the objection.

(Exception noted for defendant.)

A. Well, it was only Mr. Grover and myself and the mate and the captain that were there. That was all that was on deck that I seen. And Mr. Grover hollered to the captain and told him to get a boat out as quick as possible, and then that minute I ran back with the rope, as I said before, to try and see if I could see him to throw the rope to him. I did not see any of the preservers that Grover had—Grover had a life preserver in his hand afterwards I noticed, but I didn't see any when I cut the line. It was quite a long line but I cut it loose—it was a light line—I suppose it was the line for the forward rope they throw ashore. There was a big rope attached to the line but I got my knife out and cut it loose and ran around with it and I got around there and I could hear him—this was going back to the stern of the boat I went, and then I could hear him out to the left—the boat was drift-

ing a litle, the wind was kind of drifting the boat to the right and the boat reversed and went by, and then it went by him so that I could hear him in this direction (illustrating) right across the bow in the front, and then the boat at that time, the boat was down in the water.

(Trans., pp. 53 and 54.)

4. Error of the court in refusing to strike out the answer of witness Dahl to the question as follows:

Q. Describe to the jury this port in question so that they will understand it, as near as you can.

Trans., p. 56.)
which he answered as follows:

A. The port is about as high as this railing, perhaps, and a trifle higher, and it has got a kind of a piece to match it like that, and the port doors comes down on that and matches down on that and this port has a kind of a slot in both ends and there is an iron with a hole in it that went through the body of the boat, and this thing would slide down and you could slip it out, and when you push this up and tighten up the hand-screw on there it would fix it so that it would not slip out, and in the forward end of that there was not such a hand-screw, but when I went down there there was a big rope around it—it was lashed in one end, and in the other end was that iron.

(Trans., p. 57.)

and which was objected to and ruled upon as follows:

Q. (MR. BRONSON.) Are you testifying to what you saw after the port was put back in the boat?

A. Yes.

Mr. BRONSON. Then I move to strike out all his testimony relative to how this port was fastened after it was put back in the boat, after this had occurred.

The COURT. The motion to strike out is denied.

(Exception noted for defendant.)
(Trans., p. 57.)

5. Error of the court in allowing the witness Dahl to answer the question

Q. Could that fastener, if there had been one there, have gotten out when the port got out?

(Trans., p. 58.)

which was objected to, ruled upon and answered as follows:

MR. BRONSON. I object to that as calling for a conclusion from the witness.

The COURT. He can state the facts. I will overrule the objection.

(Exception noted for defendants.)

A. Not unless it was rusted or practically broke, because it was not there when I went down, and after that I went out and I called Mr. Grover's attention to that.

(Trans., pp. 58 and 59.)

6. Error of the court in allowing said witness Dahl to answer the question.

Q. Was there any rope about there when you went down?

(Trans., p. 59.)

which was objected to, ruled upon and answered as follows:

MR. BRONSON. I make the same objection.

(Objection overruled. Exception noted for defendants.)

A. The first time there was not, because there was no port when I went down the first time.

MR. BYERS. Was there any rope connected with the fastening or where the fastening should have been?

MR. BRONSON. I object to that as irrelevant, immaterial and incompetent.

(Objection overruled. Exception noted for defendants.)

A. No, there was no rope when I went down the first time.

(Trans., pp. 59 and 60.)

7. Error of the court in allowing witness R. H. Hohl to answer the question and explanatory question as follows:

Q. Did you find anything—well, state its condition?

A. Well, I went down just before they ran into port.

Q. Olga, is that it now?

A. Yes, Olga, and the port was not there, and I was desirous of seeing it and so after they left port we went down and the port was—

(Trans., p. 67.)

which were objected to, ruled upon and answered as follows:

MR. BRONSON. We object to this witness testifying to what he saw or what conditions existed there after the boat left Olga, as irrelevant, immaterial and incompetent.

(Objection overruled. Exception noted for defendant.)

Q. (MR. BYERS.) Go ahead and state its condition—the condition of the port.

A. The port was a port and had a thing set in and had screws on the ends to fasten—on one end it had a fastening, and the other end it didn't. We examined this after we left Olga.

(Trans., p. 67.)

8. Error of the Court in allowing said witness R. H. Hohl to answer the question

Q. How would a man open those top doors?

(Trans., p. 68.)

which was objected to, ruled upon and answered as follows:

MR. BRONSON. I object to that as irrelevant, immaterial, incompetent, and this witness is not shown to be competent to express an opinion on a question of seamanship, and this is manifestly such.

(Objection overruled.)

A. Well, the only way to open them would be to

lean against the port and shove the two top doors with your hands—two separate doors—they close on the top of the port.

(Trans., pp. 68 and 69.)

9. Error of the court in allowing the witness Hohl to answer the question

Q. If the port was in the condition that you then found it, what would be the result?

(Trans., p. 69.)

which was objected to, ruled upon and answered as follows:

MR. BRONSON: I object to that as irrelevant, immaterial and incompetent.

The COURT. He can tell what he thinks would be the probable result.

(Exception noted for defendant.)

Q. (MR. BYERS.) If a man were to open those doors with the port in the condition that you then found it in what would be the probable result?

A. Leaning against the port he would go overboard with it.

(Trans., p. 69.)

10. Error of the court in allowing the witness Hohl to answer the question

Q. Now, you said that you knew that the man went

out through that port—how do you know it if you did not see him?

(Trans., p. 76.)

which was objected to, ruled upon and answered as follows:

MR. BRONSON. I object to that as not proper redirect examination.

(Objection overruled. Exception noted for defendant.)

A. I was told by one of the—

MR. BRONSON. We object to his testifying what he was told, and we renew our objection as not proper redirect examination.

The COURT. I will instruct the jury to pay no attention to any testimony the witness gives when it turns out he is not testifying what he knows, but repeating what he has been told. The witness who told him is the one to come here and tell the jury if that is the fact. He swore he knew how the man went into the water and now he says he only knows because it was told him.

MR. BYERS. I propose to show that it was part of the transaction, that he was told in this transaction, and to fix it in that way. I will ask this question.

Q. Who told you, and when?

A. I went below later on, and I expect it was the fireman—it was the man in the hold explained it to us how he went out.

MR. BRONSON. Do I understand your Honor is

allowing him to answer that question, so that I will have my objection in the record?

The COURT. Yes, still, I think you had better find out all about it now. I will instruct the jury, though, how to treat such evidence.

(Trans., pp. 76 and 77.)

although no instruction was subsequently given.

11. Error of the court in allowing the following evidence, which was introduced over the spirit of the plaintiff in error's objection:

Q. (MR. BYERS.) You can answer the question then, Mr. Hohl?

A. Well, I went down below and the man, I expect it was the fireman, he was in the hold, told me how he went out, and that was the reason.

Q. What did he say—just give his words exactly as near as you can remember.

A. I cannot tell you—he explained the way—I could not tell you the words.

Q. Well, what was the way—give it in your own words as nearly as you can.

A. Well, as I said, he opened the upper doors and went out; that was the explanation I received.

Q. When was that, with reference to this accident?

A. That was, well, some little time afterwards.

Q. Before you got to Olga or afterwards?

A. I think it was before.

Q. Before you got to Olga?

A. Yes.

Q. How far were you from Olga when this accident occurred, approximately?

A. I don't know, it was not very long before we got to Olga.

(Trans., p. 78.)

all of this in the face of the fact that this witness had previously testified that he was asleep when the accident occurred.

12. Error of the court in refusing to strike out the answer of the witness E. J. Grover to the question

Q. What did you next do after the boat had started on and given up the man?

(Trans., p. 85.)

which was answered, moved against and ruled upon as follows:

A. I turned to the captain and told him it was a cold-blooded piece of murder as I thought.

MR. BRONSON. I move to strike out what the witness said to the captain as irrelevant, immaterial and incompetent to the issues in this case.

The COURT. I will overrule your motion.

(Exception noted for defendants.)
(Trans., p. 85.)

13. Error of the court in allowing the witness Grover to answer the question

Q. Now, can you describe to the jury, Mr. Grover,

what would naturally take place in a man opening that port, or freight gangway?

which was objected to and answered as follows:

MR. BRONSON. I object to that as irrelevant, immaterial and incompetent, and the witness is not shown to be competent.

Objection overruled. Exception noted for defendants.)

A. Do you wish me to tell what I have seen them doing when they are opening those doors? I have seen them open this port and those doors on that same boat.

Q. (MR. BYERS.) Then you may state that.

MR. BRONSON. I object to that for the same reason.

(Objection overruled. Exception noted for defendants.)

A. I have seen them take and push out the doors to fasten—push out the doors and then they would lift up the port and unfasten it if it is fastened; and if it is not fastened, of course, it would give way, but where it is fastened I have seen them unfasten it and take and swing it out and bring it in endwise; that was the way I have seen them open this particular port.

(Trans., pp. 86 and 87.)

14. Error of the court in allowing witness Grover to answer the question

Q. (MR. BYERS.) If this port, after these doors are unclosed which embraced it, and a man pulling these

around—if the port was unfastened what would be the probable result?

(Trans., p. 87.)

which was objected to, ruled upon and answered as follows:

MR. BRONSON. I object to that as irrelevant, immaterial and incompetent.

(Objection overruled. Exception noted for defendant.)

A. The man and the port both would go out, because the port is set in just exactly like that (illustrating).

(Trans., p. 87.)

15. And further error of the court in allowing the witness to continue over the plaintiff in error's objection as follows:

MR. BRONSON. I object to this witness volunteering.

A. (Continuing.) I can explain just how that port is.

MR. BRONSON. This witness is volunteering.

The COURT. You may explain it.

(Objection overruled. Exception noted for defendants.)

A. (Here witness illustrates the position of the port.) If that is the outside of the vessel (showing) the port is inside of it (showing). We will say this is the port here (showing), the port is set in just like that, just exactly (showing). It is across like that, so that it has

to be fastened in to keep from going out. It is set in just like that (showing) and this holds it from going any farther (showing). That could not come in and it could not get by this, and I don't know that it is quite that large; it might be a litle taller there (showing) and there is a fastener that goes right there (showing) and there is a fastener that goes right through the ship's side and a plank comes out here and the fastener is fastened by a screw on the inside that tightens up. Now, on the one side the fastener was there and on the other it was not. In order to take that port out they have to unfasten it and push it that way (showing) and swing it out and bring it in endwise. That was the the way they opened it.

(Trans., pp. 88 and 89.)

16. Error of the court in denying the motion of the plaintiff in error for a non-suit and an instructed verdict at the close of the plaintiff's evidence and at the close of all the evidence.

17. Error of the court in refusing to instruct the jury to bring in a verdict for the defendant, the plaintiff in error here, as requested. (Transcript, p. 163.)

(a) And in support of such exception the plaintiff in error urges that there was no evidence in the case, nor allegation in the pleadings that the plaintiff in error was, at the time when R. O. Lavender is alleged to have met his death, either the owner or operator of the steamer Lydia Thompson.

(b) That there was no evidence in the case that R. O. Lavender did meet his death at such time or that he had not since been seen, nor heard from.

(c) That there was absolutely no evidence as to how

said Lavender left the steamboat in question, if he did leave it, and that the determination of such question under the evidence in the case was a matter of pure conjecture and not supported by any evidence at all, and that by the action of the court the jury were simply allowed to guess as to how it took place.

18. Error of the court below in refusing to grant the plaintiff in error a new trial. (Trans., p. 31.)

ARGUMENT.

The argument in this brief may be divided under three headings:

(a) Error of the court below in allowing a judgment to be based upon the allegations of the complaint with reference to the ownership and operation of the steamer Lydia Thompson at a time some eight months subsequent to the alleged defective condition thereof, which is contended to have been the cause of the death of R. O. Lavender.

(b) Errors of the court below in allowing the introduction of evidence prejudicial to the rights of the plaintiff in error and over its objections.

(c) Error of the court below in refusing to instruct the jury to bring in a verdict for the plaintiff in error and in refusing to set the verdict aside and grant the plaintiff in error a new trial.

(a) The Plaintiff in Error submits that the court

below should have granted the motion of the plaintiff in error to instruct the jury to bring in a verdict for the plaintiff in error upon the pleadings and the proof in this case, in view of the fact that the complaint and amended complaint did not pretend to allege that the plaintiff in error was either the owner or operator of the steamer Lydia Thompson at the time when R. O. Lavender is alleged to have met his death. The allegations of the amended complaint and of the complaint, taken together, are that the plaintiff in error owned and operated the boat when the suit was brought some eight months after the alleged death. It would not seem necessary to cite authorities to support the contention of the plaintiff in error that an allegation of ownership or operation of the boat at the present time could not possibly be construed to extend back to any prior date, or that the court could infer that one who owns and operates a steamboat today owned and operated it six months or a year, or any other period of time, previous. We have, however, no less an authority than the Supreme Court of the United States upon this point. In the case of *Barton vs. Brown,* 145 U. S., p. 335 (36 L. Ed., p. 727), Mr. Justice Brown, in delivering the opinion at page 730, says: "Second, if the so-called amended libel be considered as an independent libel against the owner in *personam,* then it is clearly defective in failing to aver that the respondents were the owners of the tug at the time of the accident."

There was no attempt on the part of the defendant in error to prove any such ownership or operation on the part of the plaintiff in error. The record in this case is absolutely bare of one of the vital elements necessary to a recovery by the defendant in error, and we submit is compelling upon the court to reverse the case.

(b) It will probably simplify the labors of the court

and of counsel to take up the various allegations of error in the admission and rejection of evidence under one heading, and to follow them out in the order in which they are set forth in the specifications of error.

1. We submit that the court erred in allowing the plaintiff in the court below to testify that R. O. Lavender was capable of earning the sum of $1,500 a year or more (Trans., p. 45), in view of the fact that although he was an experienced seaman and had been a shipmaster, he had passed the most active period of his life wherein a man may be called upon to make great physical exertion, and that he had accepted the position of watchman on the boat in question at a salary of $50 per month, and that his only prospective salary in the fishing business was $50 a month, and a contingent interest in the profits of the business, dependent upon the hazards of the fishing industry, encumbered by all of the perils of the sea. We think it can hardly be disputed that evidence of speculative profits of this character are not legitimate elements of damage, and that the evidence in question must be construed to have influenced the jury in bringing in a verdict for $5,500 for the death of a man 56 years old, whose income was then, and whose only prospects were, to continue the same in the amount of $50 a month.

2. The plaintiff in error further contends that the court erred in allowing the defendant in error to testify to the positive fact of the death of R. O. Lavender (p. 46), and to the time of his death, not only in the absence of any showing that she knew, but in view of the fact that the proof shows that she absolutely could not have known anything about his death of her own knowledge. There may be evidence in this case from which the court can say that the jury may have been justified in finding that R.

O. Lavender came to his death. But that is not at all equivalent to saying that the ultimate fact of his death can be testified to by one who is plainly shown to have had no knowledge thereof. In other words, that we were entitled to have the jury pass upon this fact upon competent evidence, such as it was, and not to be influenced by wholly incompetent evidence.

3. We submit that the rights of the plaintiff in error were plainly trespassed upon by the court in allowing the witness Dahl, who was a passenger upon the boat, to proceed at great length in reciting his wild and incoherent story (Trans., pp. 53-54), and the things that he and Mr. Grover, his drunken fellow passenger, said and did. And we submit that the matters and things in conversations therein testified to were not, as held by the court, a part of the *res gestae*.

4. The court further erred in refusing to strike out the testimony of the witness Dahl (Trans., p. 57) given in answer to the question requiring the witness to describe the port in question, after it became apparent that the witness was testifying to the condition of the port after it had been brought back on board the steamer Lydia Thompson, and after she had called at the port of Olga and was on her voyage. How could it be assumed that a port, which had been thrown overboard from a vessel in some manner absolutely unknown to all of the witnesses in this case, and which may have been submitted to all manner of violence both before being thrown overboard and while in the sea, and after the vessel had proceeded on her voyage and had made a port of call, would be in the condition which it was in, or would have the fastenings which it possessed some time previous when an accident had occurred? There was evidence

whatever, was allowed to take the province of the jury in answer to the question, "Could that fastener, if there had been one there, have gotten out when the port got out," and testifying in answer, "Not unless it was rusted or practically broke. * * * * * " It was bad enough to allow the jury to guess as to how this port went out—in the absence of any evidence whatsoever even remotely suggesting how it did go out—and this question, if there was any evidence thereon, was for the jury to determine. In this case the court allowed the witness to do the enough that this port was subjected to usage which would have undoubtedly been sufficient to create all manner of changes in its condition. Is it to be said that the jury should be allowed to guess at to when or how it was fastened or whether or not the fastening had been left off or was removed by the act of whoever removed the port, presumably the deceased, R. O. Lavender, himself? Is there any evidence in the case from which the court or the jury could form any opinion at all on this subject?

5. Further highly prejudicial errors are found (Trans., pp. 58-59) where this voluble witness Dahl, who is not shown to have had any qualification as a seaman guessing for the jury. We submit that this error alone is ample ground for reversing this case.

6. The court committed further error in allowing the same witness to testify with reference to some supposed rope fastenings on the port in question long after the accident is alleged to have occurred, and in so doing allowed the plaintiff in the court below to set up a straw man for the purpose of knocking him down. What possible analogy or reasoning could suggest that because a rope was not on the port in question after the vessel had picked up the port and had put it in place after proceed-

ing on to Olga, such a rope had not been on the port before it went out from the steamer or was pushed out, or thrown out, or however it got out? What evidence was there that it ever was or should have been fastened with a rope?

7. The same error was enlarged upon and magnified as set forth in the seventh specification of error in this brief, as found upon page 67 of the Transcript.

8. The court committed further prejudicial error to the rights of the plaintiff in error in allowing one R. H. Hohl (see Trans., pp. 68-69), who was not a sea-faring man, to testify as to how the top doors of this port should be opened, and to volunteer the idea that R. O. Lavender may have leaned against the lower port in attempting to push the upper ports out with his hands. What right has this landsman to suggest to the jury how these ports should be opened, or to suggest to the jury that the said Lavender may have leaned against the lower port and pushed out the upper port? How very unfair all of this evidence is in view of the uncontradicted statements of the fireman (Trans., pp. 138, 139) that, although he did not see Lavender fall out or go out of the port, he had seen him kicking the lower port and shoving at it with his feet, and of the evidence of the witness Stanley that the upper ports in question were drawn out by lanyards fixed in the port by himself. (Trans., p. 112.)

9. The previous error, however, becomes trifling when compared with the next one relied upon by the plaintiff in error (Trans., p. 69), when this same witness, a landsman, is asked as an expert seaman, what would happen to an ex-shipmaster if he attempted to open these ports in an imaginary way, and when he replies that the said Lavender would go overboard with the port.

10. But for the climax we have to rely upon the

error of the court in allowing this same witness, over our strenuous objections, to go ahead and state that he knew how R. O. Lavender went overboard, although he testified that he was asleep when the accident occurred, and then to go on and recite, in violation of every elementary principle of evidence, a supposed tale given him by another person. (Trans., pp. 76, 77, 78.) We think the court below realized that error had been committed in allowing this witness to testify hearsay evidence, and that the court was attempting to be fair in letting the witness tell to the jury the circumstances which showed that his evidence was purely hearsay, and that, in view of this fact, the court suggested that it would instruct the jury how to treat such evidence. Two things may be said in answer to this, however. In the first place, the plaintiff in error has a right to try its own case and to protect its own rights, and cannot be compelled to submit to a dose of judicial medicine, administered with even the best of intents, when its rights are violated thereby. And further, the court did not instruct the jury to disregard the hearsay evidence, and it is, of course, likely, and we are entitled to presume, that the jury swallowed the evidence whole.

11. The plaintiff in error submits that it was further error for the court to allow the witness E. J. Grover, who was proven by uncontradicted evidence to have been drunk (Trans., p. 120), to go on and testify (Trans., p. 85), that he told the captain that the failure of the master and crew to rescue the man in the water was a cold-blooded piece of murder. What he thought was absolutely immaterial. Its only object could be to arouse the prejudice of the jury, for which purpose it was skillfully, and perhaps effectively, used.

12. The court committed further prejudicial error

in allowing the witness Grover, who was not a seaman or qualified in any way as an expert, to usurp the province of the jury (Trans., pp. 86, 87) and to describe what would take place upon an imaginary opening of the upper doors of this port, in the absence of any evidence at all as to how they were opened, or whether they were opened, and thereby to further bolster up the theory as to how a man *would* fall overboard based upon an explanation of how he *could* fall overboard. And further, in enlarging upon the same subject as set forth in the fourteenth and fifteenth assignments of error (Trans., pp. 87, 88 and 89). No better illustration of the theory of the plaintiff in this case can be found than is set forth in the evidence sought to be adduced by this witness.

(c) And in this connection and immediately following the foregoing argument we may take up the third division of our argument, to-wit, error of the court in refusing to instruct the jury to bring in a verdict for the plaintiff in error and in refusing to set aside the verdict and grant the plaintiff in error a new trial.

It is apparent in reading the evidence that R. O. Lavender, an ex-shipmaster and presumably able seaman, was instructed to go on the deck below the pilot house and open the two upper divisions of a port in the side of the vessel (Trans., p. 101), and that he was not instructed to open the lower half of this port opening, which consisted of a massive gate let into the side of the steamer so as to practically form a part of the bulwarks. He went below and was only seen after that time by the fireman, John Dougal, who testifies (Trans., pp. 138, 139) that he saw the watchman shoving and kicking this port with his foot. There is not one scintilla of evidence from start

to finish that anybody saw him lean against anything, or push anything, or how he fell out, or that he fell out at all, except the statement of this fireman that he heard a splash and, not seeing the watchman, immediately called to the engineer, "watchman overboard." We shall not trespass upon the time of the court in arguing that there was not sufficient evidence to be allowed to go to the jury as to whether or not R. O. Lavender did fall in the water; but we most respectfully submit and urge upon this court that there is absolutely no evidence which could go to the jury as to how he went over, whether he may have deliberately kicked the port out, which he had no instructions to remove, and gone out with it; whether he may have removed it from its fastenings and lurched out with it, or lost his balance; or whether he may have been faint and sick (Trans., p. 100), as he had been some little time previously, and fallen out while partially insensible; whether he may not have been despondent and deliberately jumped overboard; or whether he may not have gone out in any one of a hundred different ways. How he did it is a matter of pure conjecture, and we submit that under the decisions of the Supreme Court of the United States, and of the Supreme Court of the State of Washington, the jurisdiction wherein the case was tried, the jury should not have been allowed to speculate upon how this happened. In the case of *Patton vs. Texas Ry. Co.*, 179 U. S. 658 (45 Law Ed., 364), the court uses the following language after referring to the rule as applied to passengers: "A different rule obtains as to an employee. The fact of accident carries with it no presumption of negligence on the part of the employer, and it is an affirmative fact for the injured employee to establish that the employer has been guilty of negligence. *Texas & P. R. Co. vs. Barrett*, 166 U. S. 617 (41 L. Ed., 336). Second. That in the latter case it is not sufficient for the employee to show that the employer may have been guilty of negli-

gence, *the evidence must point to the fact that he was.* And where the testimony leaves the matter uncertain, and shows that any one of half a dozen things may have brought about the injury for some of which the employer is responsible, and for some of which he is not responsible, it is not for the jury to guess between these half a dozen causes and find that the negligence of the employer was the real cause when there is no satisfactory foundation in the testimony for that conclusion. If the employee is unable to adduce sufficient evidence to show negligence on the part of the employer, it is only one of the many cases in which the plaintiff fails in his testimony; and no mere sympathy for the unfortunate victim of an accident justifies any departure from settled rules of proof resting upon all plaintiffs." The court goes on to state the well known rule that while an employer is bound to furnish a safe place, it is also true that there is no guaranty by the employer that the place and machinery shall be absolutely safe. In the case of the railway company cited, the employee was working about dangerous machinery. In the case at bar the employee was working in an employment which involved the perils of the sea. It was more or less of a hazadous occupation. It has been such from the earliest history of the race. So long as man's puny efforts are opposed to the colossal forces of nature it always will be hazardous. And the language of the Supreme Court later on in the case cited, to-wit: "No one can say from the testimony how it happened that the step became loose. Under these circumstances it would be trifling with the rights of the parties for the jury to find that the plaintiff had proved that the injury was caused by the negligence of the employer."

This opinion, word for word, in letter and spirit, is exactly appropriate to the case at bar.

The plaintiff in error has no means of knowing how

R. O. Lavender went off the boat in question, no more has the defendant in error; nor did the trial court or the jury. For the court to allow the jury to guess how it happened was to trifle with the rights of the plaintiff in error in a way in which we submit that no court under the law is justified in doing. And all of this theoretical evidence, seeking to suggest to the mind of the jury some plausible way in which it *may have* happened, can only convince the court of the very fact of the inability of the defendant in error to offer any evidence of how it did happen, thus prompting the imaginary methods in which it might have happened submitted to the jury by the witnesses Grover and Hohl, over our most strenuous objection, and to the manifest and fatal prejudice of our rights. To allow these witnesses to speculate on such matters, and, as in the case of the witness Hohl, to testify to what someone else told him, of an occurrence taking place when he was asleep (Trans., pp. 70, 77), emphasizes the great injustice and error committed by the court.

The Supreme Court of the State of Washington in the case of *Mitchell vs. The Tacoma Ry. and Motor Co.*, 9 Wash. 120, at page 130 says:

"The third instruction was to the effect that if it appeared from the evidence that the injury to the plaintiff may have been the result of either mere accident or of negligence on the part of the defendant, no recovery could be had, as in such case there would not be a preponderance of proof showing negligence on the part of the company. We think this request was proper, and should have been given. Negligence will not be presumed, but must be proved as alleged, and is not made out merely by showing a state of facts which tend equally to prove negligence or mere accident."

The evidence in this case is uncontradicted, in fact

is supported by the witnesses of both the plaintiff and the defendant in error, that R. O. Lavender was not instructed to touch this lower port (Trans., pp. 101, 109), and yet what evidence there is shows that he was trying to get it out of its position with his foot. He was therefore voluntarily attempting to handle a part of the equipment of the vessel with which he had no concern, which it was not necessary for him to touch, much less remove, and was a thing with which, as an ex-shipmaster and able seaman (Trans., p. 111), he must conclusively be presumed to be familiar. If it was not properly fastened who in the world was better qualified to see and know of that fact than himself. That there was abundant light was proven by the witnesses for the defendant in error that they saw it flash out when, as they presume or imagine, he opened the upper doors of the port (Trans., p. 49).

The contention of the defendant in error that the Lydia Thompson was under-manned, and the finding of the jury to that effect, is contradicted by the uncontradicted evidence in the case that said steamer carried all of the officers and crew required by law and one more (Trans., p. 42), and by the other finding of the jury by the general verdict of the jury in favor of the defendant Stanley and Barlo. Sections 4477 and 4478 of the Revised Statutes of the United States provide for watchmen, and provide for punishing the master of the vessel if the provisions of the statute are not complied with. The evidence introduced by the defendant in the court below shows that the vessel was fully manned in accordance with the law. If the master or mate of the vessel

removed a part of the crew from its station, as in this case it was contended the watchman was removed and sent below, the act of negligence was unquestionably that of the master or mate in so doing. And the jury having found in favor of the master and mate it would seem that no extensive argument was needed in order to effectually dispose of any contention on this subject.

See *Doremus v. Root*, 23 Wash. 710.
Sterick v. Northern Pacific Ry. Co., 39 Wash. 501.

In the case of *New Orleans and R. R. Co. v. Jopes*, (U. S.) 35 L. Ed. 919, Mr. Justice Brewer, speaking for the Supreme Court of the United States, says: "It would seem on general principles that if the party who actually causes the injury is free from all civil and criminal liability, of course his employer must also be entitled to a like immunity. That such is the ordinary rule is not denied."

This was the case of a passenger on a railway, and the rule was applied even in that case.

But, if this argument were not sufficient, it only remains to be suggested that the watchman who was sent below to open the port, and whose absence the jury find contributed to his own death (in the face of the uncontradicted evidence of the fireman, McDougal, that he sang out, "Watchman overboard," and that the engineer signalled the pilot house and had the engines going astern almost instantly (Transcript, p. 141), was the very identical person whose violation of the law, if there was any violation, and whose negligence, if there was any negligence, contributed actually and vitally to the loss in question. How the court could resist the force of this argument we are at a loss to understand. The jury says that the mate Stanley, the employee of the defendant company, was not guilty of

negligence in sending the watchman from his post. The jury says that the principal was guilty of this same negligence. And the court corroborates the jury and in the face of their verdict in favor of Stanley allows the verdict against the company to stand, based upon an act of negligence which it was impossible to commit except by the voluntary act of the deceased himself. We take the liberty of suggesting once more that this error is all the more glaring in view of the occupation, age and experience of the deceased.

In conclusion, the plaintiff in error submits to the court that this whole case is based upon a tissue of conjecture and imagination; that it is wanting in the vital elements necessary to sustain the case, and that a very great injustice has been rendered the plaintiff in error by the judgment in this case; and we respectfully submit that the same should be reversed and dismissed, in accordance with the motion of the plaintiff in error in the court below.

Respectfully submitted,
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